

**BEFORE THE UNITED STATES OF AMERICA  
DEPARTMENT OF INTERIOR, MINERAL MANAGEMENT SERVICE**

In Re: Alternate Energy–Related Uses	)	
on the Outer Continental Shelf	)	Project No. <a href="#">REG-HQ-0024</a>
(RIN 1010-AD30)	)	

**COMMENTS REGARDING STATUS OF FERC PRELIMINARY PERMIT  
HOLDERS WITH EXISTING PRIORITY TO DEVELOP SITES ON OUTER  
CONTINENTAL SHELF**

In February and March 2005, the Federal Energy Regulatory Commission (FERC) issued seven preliminary permits to the Red Circle (Red Circle) Systems Corporation for the following proposed ocean current projects: (1) SeaGen Fort Lauderdale Project No. 12498; (2) SeaGen West Palm Project No. 12500; (3) SeaGen Miami Project No. 12497; (4) SeaGen St. Lucie Project No. 12499; (5) SeaGen St. Sebastien Project No. 12502; (6) SeaGen Key Largo Project No. 12503 and (7) SeaGen Tavernier Project No. 12504. The proposed projects would be located on Outer Continental Shelf Lands (OCS), at various sites between three and ten miles from shore, in the Gulf Stream off the coast of Florida. Captain Paul Wells, principal in Red Circle has also formed a separate entity, the Ocean Power Renewable Corporation (ORPC), which is now in the process of performing studies and assessments preparatory to development at the permitted sites.

The purpose of these comments is to ask MMS to clarify that it will continue to honor the priority rights to apply for a license conferred on Red Circle and other existing FERC permit holders. As discussed herein, Section 388 of the Energy Policy Act compels this result. Moreover, FERC permittees have pursued projects relying on an

expectation that they would have priority rights to file for a license. Thus, changing the rules of the game midway deprives permittees of legitimate expectations and as a matter of policy, is inherently unfair.

## **I. A Preliminary Permit Confers a Priority Rights to File a License Application**

### **A. FERC's Authority Over Ocean Renewables**

Pursuant to Part I of the Federal Power Act, 16 U.S.C. § 791 *et. seq.*, the Federal Energy Regulatory Commission (FERC) issues licenses for development of hydroelectric projects on navigable and commerce clause waters of the United States by private, state and municipal entities. In *Aqua Energy Group*, 102 FERC ¶ 61,242 (2003), FERC asserted its jurisdiction over ocean renewable energy projects located at least up to twelve miles offshore. Though the FPA only gives FERC the power to regulate hydroelectric projects, FERC reasoned that because ocean renewable projects rely on water to convert the mechanical energy of the ocean into electricity, they fall within the definition of a hydroelectric project. FERC's regulatory powers over projects in oceans extend only to ocean renewable projects (whether they capture wave, tidal or current power) and other water-driven technologies; the FPA does not give FERC power over offshore wind projects because they do not utilize water power to generate electricity.

### **B. The Purpose of the Preliminary Permit**

Section 4(f) of the Federal Power Act authorizes FERC to issue preliminary permits for the purpose of enabling applicants for a license to secure the data and to prepare the license application. 16 U.S.C. § 796. The Act further provides that “each preliminary permit [...] shall be for the sole purpose of maintaining priority of application for a license...” 16 U.S.C. § 798. These priority rights are important because

under FERC's regulations, where two otherwise equal license applications are filed for the same site, the "first to file" license applicant will prevail.<sup>1</sup> Moreover, holding a permit for a site can ward off future competition because other potential applicants realize that the permit holder has a first to file advantage, which deters them from competing for the site.

Most license applicants are willing to proceed with studying and evaluating a site because of the competitive advantage conferred by a permit. The cost of site evaluation, environmental studies and collecting data for preparing a license application can be expensive, on the order of several hundred thousand dollars. Applicants have little incentive to risk this money unless they have some assurance that their application will at least have an edge over the competition.

### **C. The Red Circle Preliminary Permits**

On May 14, 2004, Red Circle submitted twelve preliminary permit applications for the Sea-Gen project, a proposed ocean current technology, to be located in the Gulf Stream at various points off Florida's eastern coast. Subsequently, Red Circle voluntarily withdrew five of the applications, determining that those sites were not feasible and would divert resources away from more promising locations.

By order dated February 9, 2005, FERC issued preliminary permits for five Sea-Gen project sites, and on March 16, 2005, issued preliminary permits for two additional sites. Once the sites were secured, initial steps preparatory to filing a license application commenced. Paul Wells, principal of Red Circle, formed ORPC which was created to

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<sup>1</sup> See 18 C.F.R. § 4.37 (c)(providing that permittee will prevail in tie-breaker and further, giving permittee opportunity to enhance application where FERC finds competing application is better adapted).

study and assess the sites in conjunction with the permittee. Feasibility assessments of various technologies have been conducted through contracts with the Navy and a prominent environmental consulting firm was retained to begin studies necessary to preparation of a license application. These efforts are further documented in the progress reports filed by the permittee at FERC on July 31, 2005 and January 31, 2006 respectively.<sup>2</sup> The contracts for studies and assessment have already been executed, and were undertaken in reliance on the expectation that the permit holders would have priority rights to the sites. At this point, the parties remain committed to these agreements through completion.

## **II. MMS Must Honor Rights Conferred by Existing Permits**

MMS' Advanced Notice of Proposed Rulemaking (ANPR) raises the question of whether the priority rights conferred by FERC's preliminary permit will survive under whatever system MMS eventually implements to lease the OCS. The ANPR indicates that MMS will use some type of competitive system to lease OCS lands. Red Circle is concerned that MMS will open to competition those OCS lands currently encompassed within its preliminary permits and thus, deprive Red Circle of its priority rights.

MMS must honor existing permits for two reasons. First, Section 388 of the Energy Policy Act compels this result. Second, changing the rules in the middle of a process is inherently unfair, particularly when the permittee has expended money in reliance on its belief that it would have priority rights at these sites.

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<sup>2</sup> These documents can be viewed online at the FERC's website.

#### **A. Section 388 of the EPA Prohibits MMS From Limiting the Permittee's Rights**

Depending upon the system that MMS eventually implements, the permittee's rights under existing FERC jurisdiction may be compromised. For example, MMS may adopt a regime where all sites on the OCS, including the Sea-Gen sites in the Gulf Stream, are opened for bidding. Red Circle would be required to participate in the competition and could potentially lose out to another competitor, depending upon MMS' selection criteria. Alternatively, MMS might decline to lease the tracts covered by the Red Circle permits for ocean energy uses, in which case, Red Circle would lose its right to develop those sites.

Section 388 prohibits MMS from implementing any system which would deprive Red Circle of the rights conferred by the permit. Section 388(9) of the Federal Power Act provides, in relevant part that:

Nothing in this subsection displaces, supercedes, limits or modifies the jurisdiction, responsibility or authority of any federal agency...

As discussed, FERC has jurisdiction under the FPA to license hydroelectric projects, which includes ocean energy projects, such as the Sea-Gen projects. FERC issued the preliminary permits for these sites through its authority under the Federal Power Act. FERC also has the responsibility to administer its licensing program in accordance with the FPA and related regulations. Under the FPA and FERC regulations, permit holders are priority applicants with certain rights, including the exclusive right to file a license application for the site during the term of the permit and the right to prevail in a competition against a competitor with an "equally well adapted" proposal. *See* 16 U.S.C. § 798; 18 C.F.R. § 4.37, *supra*. Moreover, a permit applicant also has an opportunity to

cure and enhance its license application if FERC determines that a competing application is better adapted. *See* n.1, *supra*.

FERC's authority to issue licenses in accordance with existing rules of priority might be displaced, depending upon the type of system that MMS adopts for issuing leases. Section 388 prohibits MMS from displacing or modifying another federal agency's authority or jurisdiction.

#### **B. Fairness Requires MMS to Grandfather the Preliminary Permits**

Notions of fairness or fair play also prevent MMS from leasing OCS lands in such a way that will deprive existing permittees of priority rights. Red Circle filed these permit applications in May 2004 and received the permits in early 2005, long before the Energy Policy Act was passed. And in reliance on expectations of priority of application, costly studies have taken place and contracts have been executed. This investment might never have been made but for the expectation that Red Circle would have priority to file a license application for these sites. For MMS to change the rules midcourse would deprive Red Circle of legitimate expectation to priority at the site and possibly even constitute a taking in violation of the Fifth Amendment of the United States Constitution.

### **III. CONCLUSION**

Going forward, it is recommended that MMS and FERC enter into an MOU to determine how they will resolve potential conflicts between an MMS competitive bid system and the FERC's selection criteria for licenses under the FPA. But no matter what system MMS eventually adopts, it must must honor Red Circle's rights under the existing

FERC permits and make sure that Red Circle retains priority to file a license for these sites.

Respectfully submitted,

\_\_\_\_\_/s/ (electronic filing)\_\_\_\_\_

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